Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

NANCY WATSON, beneficiary on a life insurance policy issued to Jamie Watson,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On June 9, 2000 Jamie Watson, the grandson of Nancy Watson, died in what is commonly called a single car automobile accident. At the time of the accident, Mr. Watson had a blood alcohol level of .175%. UNUM Insurance Company initially denied coverage on the ground that the policy excluded coverage if the alcohol level of the deceased exceed the level under South Carolina law that creates a presumption that the individual was under the influence. After suit was filed, UNUM abandoned its original position and denied coverage solely on the ground that Mr. Watson did not have an accident as defined by their policy. The Fourth Circuit Court of Appeals, in an unpublished opinion, agreed.

The question presented for review is:

When a person is at fault in causing an automobile wreck that results in their death, has that person died as a result of an accident as that term is commonly understood?

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OPINIONS BELOW

The Opinion and Order of the United States District Court for the District of South Carolina is unreported and is reproduced at App. 4a. The March 22, 2004 Order of the Court of Appeals is unreported and is produced at App. 1a.

JURISDICTION

The United States Court of Appeals of Appeals entered its judgment on March 22, 2004.

The jurisdiction of the Fourth Circuit was invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10(a) and (c) in that the United States Court of Appeals for the Fourth Circuit has decided a Federal Question involving the Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1001, *et seq.* that is in conflict with other circuits and is an important question of federal law that should be resolved by this Court.

STATUTES INVOLVED

Relevant Provisions of 29 U.S.C. § 1022 provides:

> (a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and

beneficiaries of their rights and obligations under the plan.

* * *

(b) The summary plan description shall contain the following information: . . . the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits. . . .

The relevant provisions of 29 U.S.C. § 1104 provides:

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * * *

STATEMENT OF THE CASE

Jamie Watson was employed as a sales person with Lowe's in Greenwood, South Carolina. As an employee, he obtained an accidental death insurance policy from UNUM Insurance Company. He named his grandmother, Nancy Watson, as beneficiary.

On June 9, 2000 he was traveling near Ware Shoals, South Carolina when his automobile left the road and collided with some trees resulting in the death of Mr. Watson. Toxicology reports found that he had a blood alcohol concentration of .175%. The certificate of death listed the cause of death as "driver single car accident."

Nancy Watson filed her claim for benefits under the insurance policy on July 17, 2000. In numerous letters to Ms. Watson and her counsel, UNUM consistently referred to the death of Jamie Watson as an accident but denied coverage because of the alcohol exclusion in its policy and due to their determination that Mr. Watson did not sustain an injury due to accident.

Mrs. Watson filed her suit to recover the benefits under the policy. In her complaint, she noted that the defendant had improperly denied her claim because of the improper application of the presumption that the deceased was under the influence. In its answer, the defendant raised five defenses. The first two defenses, a general denial and a failure to state a claim, were in effect never pursued by the defendant. The third defense, failure of conditions precedent, arguably was the defense relied upon by the defendant that no accident occurred. That defense does not state that no accident occurred. The fourth and fifth defenses related to the two policy exclusions for alcohol consumption and crimes.

At the hearing before the district court judge, UNUM abandoned the defenses relating to the policy exclusions due to alcohol and the commission of a crime.

Lower court proceedings

The jurisdiction of the district court is based upon 29 U.S.C. § 1451(c). The jurisdiction of the Circuit Court is based upon 28 U.S.C. § 1291.

The district court ruled the alcohol exclusions applied notwithstanding the fact that the defendant had abandoned that position at the hearing. The district court further ruled that an "accident" had not occurred within the meaning of the policy. App. at 16a-17a.

The Fourth Circuit Court of Appeals on March 22, 2005 in an unpublished opinion affirmed the lower court's ruling on the ground that no accident had occurred as that term is defined in the policy. App. at 1a.

REASONS FOR GRANTING THE PETITION

When a person is at fault in causing an automobile wreck that results in their death, has that person died as a result of an accident as that term is commonly understood?

> What is an accident? Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to

> whether a certain set of facts made out an accident, the question may not yet be settled, and it must be reheard in an appellate court.

West v. Aetna Life Insurance Co., 171 F. Supp. 2d 856, 880 (N.D. Iowa 2001).

The various circuits of this country have only added to the confusion as to "What is an accident?". In this case the Fourth Circuit did not discuss any authority to support affirming the lower court. The Fourth Circuit simply concluded "We have reviewed the record on appeal, including the district court's opinion and the parties' briefs, and have found no reversible error." App. at 2a.

The Ninth Circuit Court of Appeals in an autoerotic asphyxiation case held that "A death or injury may be 'deemed 'accidental' under a group accidental insurance policy established under ERISA if the death [or injury] was unexpected or unintentional'." *Padfield v. AIG Life Insurance Co.*, 290 F.3d 1121, 1126 (9th Cir. 2002) (quoting 10 COUCH ON INSURANCE 3d, *ERISA Cases* § 139:16 at 139-38 to 139:39 (1998); *See also Todd v. AIG Life Insurance Co.*, 47 F.3d 1448, 1456 (5th Cir. 1995) (holding death is an accident if deceased expected to survive and death was not substantially certain from the actions of the deceased) and *Critchlow v. First UNUM Life Insurance Co. of America*, 378 F.3d 246 (2d Cir. 2004) (holding there is no difference between engaging in autoerotic activities and engaging in hazardous extreme-sports activities)

The Eighth Circuit Court of Appeals ruled that a death resulting from the deceased driving while intoxicated was an accidental death under ERISA. *King v. Hartford Life and*

Accident Insurance Co., 357 F.3d 840 (8th Cir. 2004) (*reh'g en banc granted* April 6, 2004). The district court in *King* had ruled that "death [is] a foreseeable outcome of driving a motorcycle while intoxicated." *Id.* at 842.

In reversing the district court the Eighth Circuit rejected the test of whether death was reasonably foreseeable and instead stated the "test must be viewed from the particular perspective of a reasonable person in the insured's position. . . . [A]n insured must have both a subjective intent and an objective expectation of not being injured." *Id.* at 845.

The Eighth Circuit applied the same test that was applied in the three autoerotic asphyxiation cases discussed above. The Fourth Circuit in relying upon the district court opinion, did not apply that test but instead agreed, without any factual basis, that death was the natural and probable consequence of driving while intoxicated. The Fourth Circuit did not view the facts from the perspective of Mr. Watson, as would have been required by the Second, Fifth, Eighth and Ninth Circuits.

The Eighth Circuit relied upon the treatise opinion of *West v. Aetna Life Insurance Company*, 171 F. Supp. 2d 856 (N.D. Iowa 2001). In *West*, a case also involving the death of an intoxicated driver, the court, after an analysis of the prevailing law, concluded, based in part upon statistical information, that the deceased did in fact die as a result of an accident. The court rejected an analysis based upon whether death is "foreseeable." *Wickman v. Northwestern National Insurance Co.*, 908 F.2d 1077 (1st Cir. 1990), the case relied upon by *West*, held the question is "[W]hether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as *highly likely* to occur as a result of the insured's intentional conduct." *Wickman* at 1088 (emphasis added).

In *West*, the court then analyzed the statistical information provided and concluded

> [T]he leap cannot be made from 'serious risks,' *i.e.* the *possibility* of injury or death, that are 'widely publicized' to the conclusion that a drunken driver knew or should have known that the consequences of driving while intoxicated are that he or she is 'highly likely' to suffer injury or death, *i.e.* the *probability* of injury or death.

West at 903 (emphasis in original). The court then concluded

> [A]lthough alcohol was a factor in a significant percentage of fatalities, common sense and logic suggest that if it were indeed 'highly likely' that a person driving while intoxicated would suffer a serious injury or be killed, the number of alcohol related fatalities in 1996, in light of the number of arrests for driving under the influence, should have been vastly greater than 17,218.

Id. at 904.[1]

1. The statistic relied upon by the court in *West* establish that in 1996, there were 1,033,000 arrests for driving under the influence and only 17,218 alcohol related fatalities. *West* at 904. According to the Source Book for Justice Statistics for 2000, an accident is an "alcohol related accident" "if either a driver or non motorist (usually a pedestrian) has a measurable or estimated blood alcohol concentration (BAC) of 0.01 or more grams per deciliter." An alcohol related accident is not the same as an alcohol caused accident. The number of deaths caused by drunk driving is, therefore, less than 17,218.

The district court in this case, recognizing that the courts are in conflict as to the meaning of the term "accident" concluded

> [A] majority of federal courts, including the Court of Appeals for the Fourth Circuit, have determined that when a death is the natural and probable consequences of an act or course of action, it is not the result of an accident nor is it produced by accidental means.

App. at 16a.

The district court did not have any factual support for its conclusion that death was the natural and probable consequence of driving while intoxicated. As required by *Wickman*, neither the district court nor the Fourth Circuit stated any basis for concluding that the death of Mr. Watson was "highly likely". The district court and the Fourth Circuit, apparently used the "reasonably foreseeable" test to deny coverage in this case.

The Seventh Circuit in *Santaella v. Metropolitan Life Insurance Co.*, 123 F.3d 456 (7th Cir. 1997), an ERISA case, has also applied a different standard from the one used by the Fourth Circuit. In *Santaella*, the court found the death to be accidental when the deceased took an overdose of her prescription medicine Darvon. In finding the death to be accidental, the court said "Mrs. Eldridge had a subjective expectation of survival and . . . such an expectation was objectively reasonable because death was not certain or even highly likely to result from her conduct." *Id.* at 464. Under the analysis used by the district court and apparently the Fourth Circuit, all UNUM is required to establish is that death was "reasonably foreseeable."

As there are conflicting standards determining the meaning of an "accident," ERISA administrators are uncertain how to interpret the insurance policies they administer. Even more troubling is the dilemma of a plan administrator of a policy issued in one of the states in the Fourth Circuit who has an insured who dies while driving under the influence in one of the states of the Eighth Circuit. Under ERISA, whether a death is accidental or not should not depend upon which circuit the deceased is in when he dies.

Inconsistent application of *Wickman case*

While most courts that have addressed the issue of what is an accident claim to have applied the *Wickman* test, they have applied it inconsistently. The Eighth Circuit in *King*, the Fifth Circuit in *Todd*, the Ninth Circuit in *Padfield* and the Second Circuit in *Critchlow* all discussed *Wickman* in terms of the act being an accident unless the act of the deceased is "substantially certain" to cause death or "highly likely" to cause death. Those cases follow the holding of *Wickman* which states that the act of the deceased is an accident unless death is "highly likely" from the actions of the deceased.

The Fourth Circuit in *Baker v. Provident Life & Accident Insurance Co.*, 171 F.3d 939 (4th Cir. 1999) and the Seventh Circuit in *Cozzie v. Metropolitan Life Insurance Co.*, 140 F.3d 1104 (1998) have both adopted the "reasonably foreseeable" test in driving under the influence cases. While both cases cite *Wickman*, neither case discusses how the term "reasonably foreseeable" is equated with "highly likely", the term used in *Wickman*.

The Seventh Circuit furthermore has apparently taken inconsistent positions with itself. While *Cozzie*, discusses the concept of "reasonably foreseeable," the same circuit used a different approach in *Santaella.* As noted previously, in *Santaella* the deceased had taken an overdose of her prescription medicine Darvon. In holding the death to be an accident the court said "[E]mploying the methodology of *Todd* and *Wickman*, we must conclude that the record requires the conclusion that Mrs. Eldridge had a subjective expectation of survival and that such expectation was objectively reasonable because the death was not certain or even highly likely to result from her conduct." *Santaella* at 464. The court in *Cozzie*, decided about nine months after *Santaella* did not discuss this inconsistency.[2] Surely death from taking an overdose of Darvon is as reasonably foreseeable as death from driving under the influence, if not more so.

The Fourth Circuit has likewise taken inconsistent positions. Under similar contract provisions prior to the enactment of ERISA, the Fourth Circuit had held that a reasonably foreseeable standard does not apply. The Fourth Circuit has long recognized that an accidental life insurance policy protects the policy holder from their own misjudgments unless the policy specifically excludes the conduct. *See, e.g., Metropolitan Life Ins. Co. v. Henkel*, 234 F.2d 69 (4th Cir. 1956) (wreck that occurred while fleeing from the police at 90 miles per hour deemed to be an accident); *Pilot Life ins. Co. v. Ayers*, 163 F.2d 860 (4th Cir. 1947) (falling from window while intoxicated deemed to be an accident); *Zurich General Accident & Liability Ins. Co.*

2. In *Cozzie* the Seventh Circuit was reviewing the finding under the arbitrary and capricious standard. The court indicated they may not have reached the same result under a de novo review. *Cozzie* at 1111.

Ltd., v. Flickger, 33 F.2d 853 (4th Cir. 1929) (death as a result of consuming "bootleg whiskey" containing wood alcohol deemed to be an accident). The Fourth Circuit in this case failed to explain why the contract interpretation in those cases was not applicable in this case.

The Fourth Circuit has held that

> When interpreting an ERISA health insurance plan, we utilize and apply ordinary principles of contract law. . . . When, however, a term used in a plan is ambiguous, that ambiguity is construed against the drafter of the plan, and it is construed in accordance with the reasonable expectations of the insured.

Bynum v. CIGNA Healthcare of North Carolina, Inc., 287 F.3d 305, 313-14 (4th Cir. 2002) (abuse of discretion standard of review). A fiduciary is in no better position to interpret ordinary words of a contract than are the courts.

The term "reasonably foreseeable" can also be defined as mere negligence. Under the definition of an accident as used in the Fourth Circuit and the Seventh Circuit in *Cozzie*, any act of simple negligence would preclude recovery by a finding that no accident occurred.

No one would dispute that it is reasonably foreseeable that if one speeds, one could have a wreck and die or receive serious injury. Likewise, it is reasonably foreseeable that if one talks on a cell phone while driving, drives while sleepy, runs a stop sign or simply goes fishing in a small boat without a life preserver, that death or serious injury could result. But in none of those reasonably foreseeable circumstances should

a court declare that an accident has not occurred. "Generally, insureds purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments." *Wickman* at 1088. Under the reasonably foreseeable standard used by UNUM and the Fourth Circuit, that would not be true.

The problem with the "reasonably foreseeable" test has best been stated by one leading authority on insurance.

> The fact that injuries and death are 'foreseeable' in a general manner is the very reason that people purchase insurance against accidents - no one who found a plane crash 'unforeseeable' would purchase trip insurance. Almost all adverse events are 'foreseeable' in an abstract sense: being hit by a car while crossing the street, breaking a leg while skiing, dying from the effects of drugs (be they legal or illegal), even having a plane crash into your house.

COUCH ON INSURANCE 3d, *Accident Insurance: Introduction* § 139 at 139-29 (1998).

Application of ERISA principles

ERISA. requires that the plan administrators, such as UNUM in this case, discharge its "duties with respect to a plan solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1). When a plan administrator gives a new and novel interpretation to the word "accident," the administrator is not complying with the terms of the plan.

ERISA further requires that a plan description be "written in a manner calculated to be understood by the average plan participant. . . ." 29 U.S.C. § 1022(a). The law further requires that the Summary Plan Description contain "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits . . ." 29 U.S.C. § 1022(b). UNUM failed in its fiduciary obligation to Jamie Watson to clearly define the circumstances that would deny him coverage. What the common man would deem to be an accident, UNUM has decided is not an accident.

UNUM has an exclusion in its policy that excludes coverage for insureds who have consumed sufficient alcohol to create a presumption under state law. If, as UNUM contends, that a wreck caused by an insured who is under the influence of alcohol is not an accident within the meaning of their policy, then there was no need for the exclusion. The only means by which the exclusion can have meaning is if a wreck caused by the consumption of alcohol is an accident under their policy. A need does not exist to exclude an act that is not an accident.

To define "accident" in terms of what is "reasonably foreseeable" is to simply include an exclusion that the average policy holder would not expect. ERISA was passed to prevent the unexpected exclusions. As one author has noted

> Absent an intent to commit suicide, coverage should always be available for an automobile crash regardless of the recklessness which precedes it. Even if one could demonstrate an insured's subjective appreciation of the dangers of drunk or otherwise imprudent driving, 'the common speech of men' is both unanimous and

> correct in describing such crashes as accidental. To hold otherwise is to sanction the deception of the public.

Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance* 86 IOWA L. REV. 173, 302 (Oct. 2000). *See also*, Michael E. Gardner, *Accidential Death Insurance Coverage of Drunk Drivers*, 69 MO. LAW. REV. 235, 253 (2004) ("[W]hen an insured dies as a consequence of his driving while intoxicated, his death should still be considered 'accidental' because a reasonable person would not view death as a natural and probable consequence of drunk driving.")

This Court has said "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefits plans.' and 'to protect contractually defined benefits.'" *Firestone and Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). Under the interpretation of the policy applied by the Fourth Circuit, an employee has fewer protections after the passage of ERISA than before. As the Second Circuit has said "Given that ERISA is not to be interpreted to afford employees and their beneficiaries less protection than they enjoyed before ERISA was enacted, . . . these principles governing exclusion clauses are no less applicable to an insurance policy governed by ERISA." *Critchlow v. First UNUM Life Insurance Co. of America*, 378 F.3d 246, 256 (2d Cir. 2004).

Under the Fourth Circuit's case law before ERISA, Ms. Watson would have prevailed. This Court's view of ERISA has been that ERISA affords more protection than before ERISA was passed . "Adopting Firestone's reading of ERISA would require us to impose a standard of review

that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, at 113-14.

Numerous state court decisions have held that when a person dies from a wreck in which the deceased had a blood alcohol level in excess of the legal limit, the wreck is an accident. *Hearn v. Southern Life Insurance Co.*, 454 So. 2d 932 (Ala. 1984); *Union Central Life Insurance Co.*, 103 Ga. App. 355, 119 S.E.2d 281 (1961); *Fryman v. Pilot Life Insurance Co.*, 704 S.W.2d 205 (Ky. 1986); *Consumers Life Insurance Co. v. Smith*, 587 A.2d 1119 (Md. Ct. Spec. App. 1990); *Schwartz v. John Hancock Mutual Life Insurance Co.*, 96 N.J. Super. 520, 233 A.2d 416 (Law Div. 1967); *Mozingo v. Mid-South Insurance Co.*, 29 N.C. App. 352, 224 S.E.2d 208 (1976); *Cranfill v. Aetna Life Insurance Co.*, 49 P.703 (Okla. 2002); *Harrell v. Minnesota Mutual Life Insurance Co.*, 937 S.W.2d 205 (Tenn. 1996); *Freeman v. Crown Life Insurance Co.*, 580 S.W.2d 897 (Tex. Civ. App. 1979); *LDS Hospital v. Capitol Life Insurance Co.*, 765 P.2d 857 (Utah 1988). As noted by the Oklahoma Supreme Court, state courts "have overwhelmingly" found the death of an intoxicated driver to be accidental. *Cranfill* at 707.

Congress did not intend for the courts to give an interpretation of a contract under ERISA that affords less protection to a beneficiary under ERISA than the beneficiary would have had without ERISA. Under the holding of the Fourth Circuit in this case, Nancy Watson, the beneficiary, has less protection under ERISA than she would have had without ERISA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari to resolve the conflict between the Second, Fifth, Seventh and Eighth Circuits and the Fourth and Seventh Circuit concerning this question involving the Federal Employee Retirement Income Security Act.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 22, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1253

NANCY WATSON, beneficiary on a life insurance policy issued to Jamie Watson,

Plaintiff - Appellant,

versus

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant - Appellee.

Submitted: February 9, 2005 Decided: March 22, 2005

Before NIEMEYER, TRAXLER, and SHEDD, Circuit Judges.

PER CURIAM:

Nancy Watson appeals from the district court's order entering judgment in favor of Unum Life Insurance Co. ("Unum") in her action seeking to recover the proceeds of an accidental death and dismemberment plan pursuant to 29 U.S.C. § 1132(a)(1)(B) (2000). We affirm.

Appendix A

On June 9, 2000, Jamie Watson died as the result of injuries sustained in a single-car collision in Ware Shoals, South Carolina. At the time of his death, Jamie was an employee of Lowe's Companies, which established an employee accidental death and dismemberment plan with Unum. Nancy Watson—Jamie's grandmother—was designated as sole beneficiary.

The traffic report stated that the driver of Jamie's vehicle was "driving at a high rate of speed lost control of the vehicle and ran off right side of the roadway striking a ditch which caused the vehicle to overturn and strike two trees." The toxicology report disclosed that, at the time of the accident, Jamie was driving with a blood alcohol level of .175%.

Unum denied Watson's claim for benefits on the grounds that Jamie "did not sustain an 'Injury' that resulted in a covered loss as defined in the Policy," *i.e.*, Jamie "did not sustain an accidental bodily injury that resulted directly and independently of all other causes." J.A. 151. Unum concluded, instead, that Jamie's "action of driving while under the influence of alcohol at a blood alcohol level of .175% was deemed to have caused, contributed to or resulted in his motor vehicle accident." Watson then filed this action in district court alleging that she was denied benefits under the policy in contravention of ERISA.

After a bench trial, the district court entered judgment in favor of Unum, finding that Unum did not abuse its discretion in deciding that Jamie's death was not the result of an "injury" as defined in the policy. We have reviewed the record on appeal, including the district court's opinion and the parties' briefs, and have found no reversible error. Accordingly, we affirm.

Appendix A

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DATED JANUARY 30, 2003 AND FILED JANUARY 31, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

C/A No. 8:01-4704-24

Nancy Watson, as the listed beneficiary on a life insurance policy issued to Jamie Watson.

Plaintiff,

v.

UNUM Life Insurance Co. of America,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Plaintiff Nancy Watson, as listed beneficiary on a life insurance policy issued to Jamie Watson (the "Decedent"), brings this action against Defendant UNUM Life Insurance Company of America, alleging she was denied accidental death benefits in contravention of the Employment Retirement Income Security Act of 1974, as amended, 42 U.S.C. §§ 1001 *et seq.* ("ERISA"). Plaintiff brings this action under 29 U.S.C. § 1132(a)(1)(B), which provides:

> A civil action may be brought–(1) by a participant or beneficiary . . . (B) to recover benefits due to

> him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

On December 6, 2002, Defendant submitted a memorandum in support of judgment. On December 27, 2002, Plaintiff filed a reply brief. This matter came before the court for a bench trial on January 7, 2003. The court has considered the memoranda, arguments of counsel, administrative record, and applicable law. The court makes the following findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52.

FINDINGS OF FACT

1. In June 2000, Decedent was an employee of Lowe's Companies, Inc. in Greenwood, South Carolina. Decedent was a participant in a group accidental death and dismemberment policy provided by Lowe's Companies, Inc. to its employees through UNUM Life Insurance Company of America (the "Policy"). Decedent designated Plaintiff as the sole beneficiary of the Policy, with a benefit of $100,000.00.

2. Among other things, the Policy provides:

> **Injury** means a bodily injury that is the direct result of an accident and not related to any other cause.
>
> . . . .

Appendix B

If We approve the claim, We will pay each Insured a benefit for a covered **Loss** which is the result of an **Injury.**

. . . .

We will not pay any claim for a loss that is caused by, contributed to by, or resulting from:

. . . .

the voluntary ingestion of that percentage of alcohol in the Insured's blood or the Insured dependent's blood which raises a presumption that the Insured or the dependent was driving any vehicle used for transportation while under the influence of alcohol. The blood-alcohol level which raises this presumption is governed by the laws of the state in which the accident occurred[.]

3. On June 9, 2000, Decedent died as a result of a single car automobile collision in Ware Shoals, South Carolina. According to a South Carolina Uniform Traffic Collision Report filled out by investigation officers at the scene,

> Unit 1 was traveling north on Sec. 38, Driver of Unit 1 driving at a high rate of speed lost control of the vehicle and ran off right side of the roadway striking a ditch which caused the vehicle to overturn and strike two trees.

4. Decedent was traveling at an estimated speed of 75 mph in a 30 mph zone. Toxicology reports from the South Carolina Law Enforcement Division Forensic Services Laboratory disclosed that Decedent had a blood alcohol level of 0.175 percent.

5. On or about June 16, 2000, Plaintiff submitted a claim to Defendant for accidental death benefits under the Policy.

6. By letter dated November 20, 2000, Defendant informed Plaintiff that it was denying Plaintiff's claim for benefits. The denial letter provided, in relevant part:

> I am enclosing a copy of the provisions of UNUM Life Insurance Company of America's AD&D policy that define accidental bodily injury and under what circumstances benefits will be paid. The policy does not cover a loss caused by or contributed to by the use of alcohol above the legal limit.
>
> The information I have from Coroner, James T. Coursey indicates that at the time your grandson sustained his fatal injuries, he was driving under the influence of alcohol. His blood alcohol level was .17%. The legal limit for the state of South Carolina is .08%.
>
> Because the policy does not cover a loss that is caused by or contributed to by the presence of a percentage of alcohol in the insured dependent's

blood which raises a presumption that he was under the influence of alcohol, benefits for this claim are not payable.

7. Plaintiff thereafter retained counsel. On December 12, 2000, counsel for Plaintiff wrote Defendant requesting that Defendant reverse its claim determination. Counsel informed Defendant that:

I have examined your exclusion. It provides:

"We will not pay any claim for a loss that is caused by, contributed to by, or resulting from:

The voluntary ingestion of that percentage of alcohol in the Insured's blood or the Insured dependent's blood *which raises a presumption that the Insured or the dependent was driving any vehicle used for transportation while under the influence of alcohol*. The blood-alcohol level, which raises this presumption, is governed by the laws of the state in which the accident occurred."

South Carolina *does not* have a *presumption* statute until the later of the following dates: January 1, 2001, or when the Chief of SLED certifies to the President Pro Tempore of Senate and the Speaker of the House of Representatives that all breath test sites in the State have been equipped with video cameras so that a person's conduct may be videotaped pursuant to Section 56-2953(A)(2). (See attached).

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The law in effect at the time of the decedent's death is as follows:

"If the alcohol concentration was at the time ten one-hundredths of one percent or more, it *may be inferred* that the person was under the influence of alcohol."

South Carolina distinguishes an *inference* from a *presumption*. For instance, if a person blows .05 100's of one percent or less, the person is *presumed* not to be under the influence. Our legislature opted not to adopt the presumptive wording in the 1993 legislation for persons who blew .10 or greater. Instead they adopted an inference standard.

Therefore, the denial of this claim is erroneous. Your exclusion is limited to a presumptive percentage. Demand is hereby made to you to reverse the decision and pay the claim immediately.

7. By letter dated January 5, 2001, Defendant informed Plaintiff's counsel that it had received his appeal and was reviewing its decision.

8. By letter dated March 19, 2001, Defendant informed Plaintiff's counsel that it was upholding the denial of the claim for the following reasons:

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Toxicology results were provided to our company from the South Carolina Law Enforcement Division Forensic Services Laboratory. The tests disclosed that at the time Mr. Watson sustained his fatal injuries, he was driving with a blood alcohol level of .175%.

UNUM must determine whether the proof of claim provided supports that an Insured sustained a covered loss as the result of sustaining a bodily injury that was the direct result of an accident and not related to any other cause. Based on the Toxicology results reported, Mr. Watson was driving with a blood alcohol level well in excess of the limit under which a surviving individual would reasonably be charged with driving under the influence.

State laws prohibiting drinking and driving are directly related to the causal relationship between driving under the influence of alcohol and motor vehicle accidents, which in this case was a fatal accident. In turn, UNUM refers to the DUI levels identified per state for rendering our determination as to whether the reasonable presumption exists that the Insured was driving under the influence when they sustained their fatal injuries.

As such, it remains our position that Mr. Watson did not sustain an "Injury" that resulted in a covered loss as defined by the Policy because the loss was not shown to have resulted directly and

independently of all other causes from accidental bodily injury.

Instead, Toxicology tests disclosed that Mr. Watson was driving with a blood alcohol level that raised the reasonable prescription that he was driving a vehicle while under the influence of alcohol, which in turn reasonably caused, contributed to, or resulted in the fatal accident. As such, the claim was subject to the aforementioned Policy exclusion. Based on these findings. I must uphold the denial of benefits on appeal.

9. On July 9, 2001, Plaintiffs counsel requested reconsideration of the denial of Plaintiff's claim and requested additional time to provide a written opinion of a consulting attorney. By letter dated the same day, Defendant informed counsel that it would accept additional information for a period of thirty days.

10. On July 19, 2001, Plaintiff's counsel submitted a statement prepared by Professor William A. McAninch of the University of South Carolina School of Law in which Professor McAninch discussed South Carolina law regarding presumptions and inferences about the amount of alcohol ingested and being under the influence.

11. On September 27, 2001, Defendant again denied Plaintiff's claim. According to Defendant:

As you know, toxicology results were provided to our company from the South Carolina

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Law Enforcement Division Forensic Services Laboratory. The tests disclosed that at the time Mr. Watson sustained his fatal injuries, he was driving with a blood alcohol level of .175%.

Based on information provided by the South Carolina Uniform Traffic Collision Report, Mr. Watson's fatal motor vehicle accident occurred at 1:27 a.m. Mr. Watson was driving at a high rate of speed and lost control of his vehicle running off the roadway into a ditch, causing the vehicle to overturn and strike two trees. It was reported that it was dark, that the weather was clear with no adverse conditions and that the accident occurred in a residential area on a level curve, noting dry weather conditions, no defects in the road, and no vision obstructions. It was further reported that there were no defects in the vehicle that Mr. Watson was driving.

Based on the information provided, it is apparent that Mr. Watson, who consumed enough alcohol to raise his blood alcohol level to at least .175%, attempted to operate his vehicle late at night at a high rate of speed while under the influence of alcohol.

In your letter you noted that under South Carolina law of an individual is driving with a blood alcohol level of .10% or higher, it may be inferred that the individual was driving under the influence of alcohol. Again noting that Mr. Watson was

driving with a blood alcohol level of .175%, it is thereby reasonable to infer that he was driving under the influence of alcohol when he incurred his fatal motor vehicle accident. In addition, it is widely known and publicized that driving under the influence of alcohol is not only against the law but that such an action is prohibited because it is extremely hazardous to oneself and others.

In the exercise of its discretionary authority to determine Mr. Watson's eligibility for benefits and to interpret the terms of the Policy, UNUM stands by its position that Mr. Watson did not sustain an "Injury" that resulted in a covered loss as defined by the Policy. Based on the proof of claim provided to our company, the loss [of] Mr. Watson's life in a fatal motor vehicle accident was not the result of an accident unrelated to any other cause. Instead, Mr. Watson's action of driving while under the influence of alcohol at a blood alcohol level of .175°% was deemed to have caused, contributed to or resulted in his motor vehicle accident by impairing his ability to operate the motor vehicle safely.

12. Plaintiff brought the within action on December 10, 2001.

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CONCLUSIONS OF LAW

1. There exists a "well-settled framework" for reviewing an administrator's or fiduciary's denial of benefits under an ERISA plan. *Ellis v. Metropolitan Life Ins. Co.*, 126 F.3d 228, 232 (4th Cir. 1997). Initially, the court must determine whether the ERISA plan confers discretionary authority upon the administrator or fiduciary. *Id.* at 233; *Haley v. Paul Revere Life Ins. Co.*, 77 F.3d 84, 89 (4th Cir. 1996). If the plan confers discretion, the court must decide whether the administrator or fiduciary acted within the scope of that discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). Where the administrator or fiduciary acts under contractually-conferred discretion, the court must accord deference to the decision and review the determination only for an abuse of discretion. *Bedrick v. Travelers Ins. Co.*, 93 F.3d 149, 152 (4th Cir. 1996); *Doe v. Group Hospitalization and Medical Servs.*, 3 F.3d 80, 85 (4th Cir. 1993). Under this deferential standard of review, the court will not disturb a reasonable decision by an administrator or fiduciary, even if, independently, the court would have reached a different conclusion. *Ellis*, 126 F.3d at 232.

2. The Policy confers discretionary authority on Defendant. The applicable language reads as follows: "When making a benefit determination under the policy, UNUM has discretionary authority to determine the insured's eligibility for benefits and to interpret the terms and provisions of the policy."

3. The Fourth Circuit Court of Appeals has determined that a conflict of interest occurs when the plan administrator and insurer under the plan are the same. When a conflict of interest exists, the decision to deny long term disability benefits should be subjected to a "sliding scale" additional scrutiny. *See Edmonds v. Hughes Aircraft Co.*, 1998 WL 228200, at *7 (4th Cir. May 8, 1998). Under this additional scrutiny, "[t]he more incentive for the administrator or fiduciary to benefit itself by a certain interpretation of benefit eligibility or other plan terms, the more objectively reasonable the administrator or fiduciary's decision must be and the more substantial the evidence must be to support it." *Id.* In this case, Defendant is both insurer and administrator of the Policy. Accordingly, the court must apply the "sliding scale" even though there is no evidence of a deliberate consideration of the fiduciary's self-interest. *Id.* The court is limited to the evidence that was before the plan administrator at the time of the decision. *Bernstein v. CapitolCare, Inc.*, 70 F.3d 783 (4th Cir. 1995).

4. When interpreting the benefits provisions of ERISA regulated insurance plans, courts are guided by federal substantive law. *Baker v. Provident Life & Accident Ins. Co.*, 171 F.3d 939, 943 (4th Cir. 1999) (citing cases). The language of the plan is paramount in this endeavor. *Id.* In this case, the Policy provides coverage for injuries that are the direct result of an accident and not related to any other cause. The Policy further excludes coverage for losses caused by, contributed to by, or resulting from voluntary ingestion of alcohol under certain conditions. Defendant relied upon both provisions of the Policy when

it denied coverage. The court is mindful that the Policy unambiguously confers discretion upon Defendant to interpret the leans and provisions of the Policy.

5. With respect to covered losses, the term "accident" is not defined in the policy. To interpret an undefined term, courts may reference a number of sources, including state law and the law of other federal courts. *Id.* Under South Carolina law, the word "'accident,' when applied to human action, means something done without design or intention." *Latimer v. Sovereign Camp Woodmen of the World*, 40 S.E. 155 (S.C. 1901). Some courts have held that an intoxicated driver's death in a single-vehicle accident as a result of drinking and driving falls within the meaning of an "accident" in a policy. These courts have reasoned that intentionally driving while intoxicated does not evidence a plan, design, or intent on the part of the insured to cause his death. *See, e.g., American Family Life Assur. Co. v. Bilyeu*, 921 F.2d 87 (6th Cir. 1990); *Cranfill v. Aetna Life Ins. Co.*, 49 P.3d 703 (Okla. 2002); *Harrell v. Minnesota Mut. Fire Ins. Co.*, 937 S.W.2d 809 (Tenn. 1996). However, a majority of federal courts, including the Court of Appeals for the Fourth Circuit, have determined that when a death is the natural and probable consequence of an act or course of action, it is not the result of an accident nor is it produced by accidental means. *See Baker v. Provident Life & Accident Ins. Co.*, 171 F.3d 939, 942 (4th Cir. 1999) (citing cases). The court concludes that Defendant did not abuse its discretion in determining that Decedent did not a sustain an injury that resulted in a covered loss as defined by the Policy.

6. With respect to the exclusion for accidents caused by, contributed to by, or resulting from voluntary intoxication, Plaintiff contends that South Carolina law provides for only an inference, not a presumption, of intoxication when an individual's blood alcohol level reads 0.10 percent. However, a plain reading of the Policy reveals that the presumption arises under the terms of the Policy itself, regardless of whether the state in which the injury occurred provided by law for a legal presumption. Decedent's blood alcohol level was determined by the authorities to be 0.17 percent. The court concludes that Defendant did not abuse its discretion in determining that Decedent's blood alcohol level raised the presumption that he was driving while under the influence of alcohol, which, in turn reasonably caused, contributed to, or resulted in the collision.

7. The court finds and concludes that Defendant did not abuse its discretion in denying benefits under the Policy. Accordingly,

IT IS ORDERED that judgment in favor of Defendant be entered in accordance with Rule 58, FRCP.

IT IS SO ORDERED.

s/ Margaret B. Seymour
Margaret B. Seymour
United States District Judge

Spartanburg, South Carolina

January 30, 2003

No. 05-20

Supreme Court, U.S.
FILED
1 . 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NANCY WATSON, beneficiary on a life insurance policy issued to JAMIE WATSON,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Jamie Watson died as the result of injuries sustained in a single-car collision on June 9, 2000 in Ware Shoals, South Carolina. At the time of his death he had a blood alcohol level of .175%. Mr. Watson was an employee of Lowe's Companies which had established an ERISA governed group accidental death and dismemberment plan that was fully insured by Unum Life Insurance Company of America ("Unum"). Mr. Watson designated his grandmother, Nancy Watson, as his sole beneficiary and pursuant thereto, she made a claim for benefits.

The plan at issue granted Unum discretionary authority to determine eligibility for benefits and interpret the terms of the plan. After three reviews, the claim for benefits was denied by Unum on the grounds that Mr. Watson "did not sustain an 'Injury' that resulted in a covered loss as defined in the Policy." Unum concluded that Mr. Watson's action of driving while under the influence of alcohol at a blood alcohol level of .175% caused, contributed to, or resulted in his death and that his death was not an accident which was covered by the policy.

Nancy Watson sought a review of Unum's decision by the United States District Court in South Carolina. The district court held that Unum did not abuse its discretion in denying the claimed benefits and upon appeal, the Fourth Circuit Court of Appeals affirmed the district court in an unpublished opinion.

The Petitioner has presented a question for review that has only a tangential relationship to this case. The Petitioner is asking this Court under the federal common law under ERISA to define and set forth the term "accident" as it is "commonly understood." This question presented does not present a novel issue or a split in circuit court decisions. Accordingly, the Court should not grant certiorari on this question.

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Statute:

29 U.S.C. § 1001, *et seq.* 1

OPINION AND JUDGMENT BELOW

This matter involves a claim for benefits under an insurance plan covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq*. This matter came before the District Court for a bench trial on January 7, 2003. After consideration of the parties' memoranda, arguments of counsel, the administrative record and the applicable law, on January 31, 2003, the District Court rendered findings of fact and conclusions of law and entered judgment for UNUM Life Insurance Company of America. Watson filed her Notice of Appeal on February 27, 2003. In an unpublished opinion dated March 22, 2005, The Fourth Circuit Court of Appeals affirmed the District Court's ruling that Watson's death was not the result of an "injury" as defined under the policy.

ERRORS AND OMISSIONS IN PETITIONER'S STATEMENT OF THE CASE

Petitioner includes an abbreviated version of the facts within her argument and her Statement of the Case. However, Petitioner misstates certain facts and omits others that are important to the Court's decision.

Petitioner incorrectly states that "after suit was filed, Unum abandoned its original position and denied coverage solely on the ground that Mr. Watson did not have an accident as defined by their policy." Brief of Petitioner at i. However, this statement is simply incorrect in that Unum clearly denied Watson's claim during the claims process and not after the lawsuit was filed. App. at 10a.

Petitioner omits that the plan at issue gave Unum discretionary authority to determine eligibility for benefits and to interpret the terms and provisions of the plan. App. at 14a.

Petitioner also omits the actual language of the contract term at issue, which states: "Injury means bodily injury that is the direct result of an accident and not related to any other cause." App. at 5a.

Finally, Petitioner omits that the South Carolina Uniform Traffic Collision Report filled out by investigating officers of the South Carolina Department of Public Safety stated:

> Unit 1 was traveling north on Sec. 38, Driver of Unit 1 driving at a high rate of speed lost control of the vehicle and ran off right side of the roadway striking a ditch which caused the vehicle to overturn and strike two trees.

App. at 6a.

The Uniform Traffic Collision Report indicated that Jamie Watson's estimated speed was 75 mph in a 35 mph zone, the weather was clear, there were no adverse conditions, the collision occurred in a residential area on a level curve, there were no defects in the road or the vehicle, there were no vision obstructions, and that Jamie Watson contributed to the collision. App. at 7a.

REASONS FOR DENYING THE PETITION

Petitioner begins the argument contending that there is "confusion" among the "various circuits of this country" when applying the federal common law under ERISA with regard to the definition of an "accident." Brief of Petitioner at p. 5. Yet, four pages later, Petitioner admits that "while most courts that have addressed the issue of what is an accident claim to have applied the *Wickman v. Northwestern National Insurance Company*, 908 F.2d 1077 (1st Cir.), *cert. denied*, 498 U.S. 1013, 112 L. Ed. 2d 586, 111 S. Ct. 581 (1990) test, they have applied it inconsistently." *Id.* at p. 9.

Thus, there is no "confusion" between the circuits as to what test to apply. Petitioner subsequently contends that the circuits are applying the test "inconsistently." But, Petitioner's argument fails in that the circuits draw a distinction with respect to the type of activity in which one is engaged. Regardless of the actual language used, the analysis is the same and the results are uniform. Under the present federal common law under ERISA, drivers cannot reasonably expect to have their injury or death characterized as "accidental" when they drive drunk in violation of state law.

Additionally, Petitioner fails to point out that the *Wickman* decision is cited by Petitioner's leading case as being the cause of the uniformity of results in cases involving intoxicated drivers and the definition of an "accident." As a result, the Petitioner complains of uniform results from the application of the same test. The Petitioner then cites to a ruling, which has been vacated. *King v. Hartford Accident Insurance Co.*, 357 F.3d 840 (8th Cir. 2004), *vacated and rehearing en banc granted*, 2004 U.S. App. LEXIS 6503

(April 6, 2004). The *King* decision also leaves in doubt the *West* decision upon which it relied for statistics and related arguments. Accordingly, the petition should be denied.

ARGUMENT

I. WHEN DEATH IS THE RESULT OF AN INSURED DRIVING WHILE INTOXICATED IT IS NOT ACCIDENTAL.

The Petitioner contends that this Court should review this case to resolve a conflict in some of the decisions of the circuit courts of appeal about intoxicated drivers and whether their self inflicted deaths should be considered accidents. However, this conflict is more imagined than real. The conflict, if one can be said to exist, "is between the federal courts on one hand and state courts on the other." *Cranfill v. Aetna Life Insurance Company,* 2002 OK 26, 49 P.3d 703, 707 (2002). In fact, a case cited and quoted extensively by the Petitioner, *West v. Aetna Life Insurance Company*, 171 F. Supp.2d 856 (N.D. Ia. 2001), made the following observation about *Wickman v. Northwestern National Insurance Company*, 908 F.2d 1077 (1st Cir.), *cert. denied*, 498 U.S. 1013, 112 L. Ed. 2d 586, 111 S. Ct. 581 (1990) when it stated as follows:

> The *Wickman* decision is important for a number of reasons here, but most importantly for the near uniformity with which courts in ERISA cases involving intoxicated drivers have since relied on *Wickman* to reject the "accidental means" test as a definition of "accident" and have instead embraced the *Wickman* definition of "accident. . . ."

* * * *

> Thus, the court finds that *Wickman* may be treated as a statement of federal common law for the definition of "accident" under an ERISA plan in which the term is not unambiguously defined. *Id.* at 884-86.

A. *The Wickman Decision*

Courts have struggled with various means to define and understand the term "accident", particularly as it applies to life and accident insurance. Justice Cardozo became a part of the legal lore by employing the expression "Serbonian bog" when referring to an oft-employed distinction between accidental means and accidental results. *Landress v. Phoenix Mutual Life Insurance Company*, 291 U.S. 491, 499, 54 S. Ct. 461, 463, 78 L. Ed. 934, 938 (1934).

When it came to the formation of a standard adopted by the federal court system in ERISA cases, the court in *Wickman* appears to have succeeded. *See* the court's comment in *West*, noting that Wickman may be treated as a statement of federal common law for the definition of "accident" under ERISA. . . . 171 F. Supp.2d at 886. However, Petitioner misunderstands *Wickman*.

The Petitioner refers to expressions such as "highly likely" as being a matter of "probability". Brief of Petitioner at pages 6-7. In fact, an attempt is made to imply that statistically a death must be more (very) probable than not for the result to be other than accidental. Petitioner attempts to bolster this approach by the use of drunken driving statistics which establish (for the year 2000) that a person is

more likely to be arrested for drunk driving than to die of drunk driving. *Id.* at note 1 page 7.

However, this is a fallacious argument in the face of *Wickman* which Petitioner so heartily advocates. In *Wickman* the court noted that people who engage in games of Russian roulette do not expect or intend to be killed.[1] Yet the courts uniformly refuse to call the death accidental, regardless of insured's actual expectation or intention. *Wickman* at 1087. Similarly, when people play games like Russian roulette, their deaths are not regarded as accidental. *Id.*

Thus, an insured who understands the odds and has no intention or reasonable expectation (statistically) of causing his own death but who dies playing Russian roulette, does not, as far as the courts are concerned, die by accidental means. It may be that society has evolved to a point where some behavior is so disfavored and frowned upon that one who engages in the activity is afforded far less protection than other riskier but more acceptable behavior.[2]

The Petitioner is proposing an idea that was rejected in *Wickman*—the concept that unless the intoxicated driver actually expected to die, or unless it can be shown that he was statistically at a very high risk of dying such that the probability of his death could not be ignored by a reasonable man, his death must be classified as an accident. Aside from

[1] In fact, if using a six shot revolver, the odds are very strongly in favor of the player *not* being shot (less than 17%).

[2] The district court in *West* notes that *Wickman* is important for a number of reasons, "but most particularly for the near uniformity with which courts in ERISA cases" reject an accidental means test with cases involving intoxicated drivers. 171 F.Supp.2d at 884.

the reasons given in *Wickman* which make such a test inappropriate, the Petitioner ignores the danger to innocent third parties created solely by the actions of intoxicated drivers. While to place oneself in peril is one thing, but how could any reasonable person subject multitudes of innocent third parties to such exposure?[3]

What *Wickman* also pointed out is that it is not any major formula or words which determine whether a death is "accidental." It is not the difference between "should have known" or "substantially likely to occur" or "highly like to occur" or "that a reasonable person in his shoes would have expected the result and that any other expectation would be unreasonable" but it is something in addition to those criteria.

The *Wickman* court found that the deceased either "subjectively expected serious injury or the evidence was inconclusive as to his subjective expectation." However, objectively "he reasonably should have expected serious injury when he climbed over the guardrail" and suspended himself with only one hand. 908 F.2d at 1089. Similarly, it is common for a majority of federal courts to find a "death which is the natural and probable consequence of an act or course of action is not an accident nor is it produced by accidental means, and if not the result of actual design [the] insured must be held to have intended the result." *Baker v. Provident Life & Accident Insurance Company*, 171 F.3d 939, 942 (4th Cir. 1999).

Thus, the courts applying federal common law under ERISA draw a distinction with respect to the type of activity

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[3] Pointing a revolver with less than a 17% chance of firing at a totally innocent and random third person and pulling the trigger would earn the perpetrator a lengthy prison sentence despite the actual odds of death.

in which one is engaged. Regardless of the actual language used, the analysis is the same and the results are uniform. Under the present common law, drivers cannot reasonably expect to have their injury or death characterized as "accidental" when they drive drunk in violation of state law.[4]

The circuits are and have all been relatively consistent in their result. They have all decreed that they will not regard the infliction of death or injury on an intoxicated driver as an accidental event for insurance purposes. The courts will not permit the intoxicated driver to benefit at the expense of the other contributors to the fund.[5]

II. THE FOURTH CIRCUIT'S RULING WAS CONSISTENT WITH FEDERAL COMMON LAW UNDER ERISA.

The Petitioner also contends that the Fourth Circuit Court of Appeals has taken "inconsistent positions". In support of this argument, *Metropolitian Life Insurance Company v. Henkel*, 234 F.2d 69 (4th Cir. 1956) is cited. However,

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[4] Virtually all the cases refer to the insured's alcohol content when discussing the facts of the case. It could also be argued that the most intoxicated person would be the least likely to recognize the consequences of their actions (in operating a vehicle) and thus should be the most immune from having their actions characterized as intentional.

[5] Interestingly, the *Wickman* court found the starting point is the reasonable expectation of the insured at the time the policy was purchased. 902 F.2d at 1088. There are no statistics about how many persons would check the "yes" box if asked if they expected the insurance to cover them if they decided to voluntarily drive drunk and cause a death at the time the policy was issued.

Metropolitan was a pre-ERISA case that applied the law of North Carolina which distinguished between "accidental means" and "accidental results".

Petitioner complains that in her case the Fourth Circuit Court of Appeals "failed to explain why the contract interpretation in those cases was not applicable in this case. "Brief of Petitioner at p. 11. This explanation should not have been necessary. The *Wickman* case specifically addressed this issue and noted that the test employed was "artificial and confusing" and concluded the matter by stating "[t]hus, we elect to pursue a path for the federal common law which safety circumvents the 'Serbonian Bog.'" 908 F.2d at 1086.

Similarly, the Petitioner alleges that the "reasonably foreseeable standard" did not apply in *Patch v. Metropolitan Life Insurance Company*, 733 F.2d 302 (4th Cir. 1984). Brief of Petitioner at 10. The Petitioner is completely mistaken. The *Patch* case was whether an overdose of heroin resulted in an "accidental" death. The Fourth Circuit applied the "reasonably foreseeable" standard when it found the deceased to have "deliberately exposed himself to a substantial and foreseeable risk of serious injury or death, even if death is neither intended nor certain to result." *Id.* at 304.[6]

Finally, Petitioner cites *Zurich General Accident & Liability Insurance Co. v. Flickinger*, 33 F.2d 853 (4th Cir.

[6] This case was decided under Virginia law but it may be noted that the court likened heroin use to playing Russian roulette and noted that for one who engaged in such activity, "fully aware of the manifold risks involved", death was a natural and probable consequence of his knowing actions "and was therefore not accidental. 733 F.2d at 304.

1929) for the proposition that a reasonably foreseeable standard did not apply. In *Zurich General*, the 1929 Court used "unforeseen, unexpected and unusual" instead. The issue was the poisoning of the decedent from consuming a drink with wood alcohol—something which he did not know it contained nor, in fact, did the person who gave him the drink. As the court said: "There would seem to be no room for argument that under this definition a death which results from unintentionally drinking wood alcohol while supposedly drinking an ordinary gin cocktail is death from accidental means." *Id.* at 855.[7]

Petitioner attempts to create inconsistency by relying on Fourth Circuit diversity cases. However, because these cases utilize state law, they have no application to the present case. The Fourth Circuit has not been inconsistent in applying the federal common law under ERISA.

CONCLUSION

The circuit courts of appeal are very consistent in their holding that an unlawfully intoxicated driver who dies at his own hand behind the wheel of a motor vehicle did not die from an accident as that term is intended to be defined in policies governed by ERISA.

More importantly however, the Petitioner cannot establish any basis for this Court to review a case in which

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[7] The court further noted that "[t]his case falls within the class of cases involving the unintentional taking of poison, cases in which the insured intended to swallow what he did swallow, but was ignorant of the fact that it contained poison. Such cases, without exception, have been held to involve death by accidental means [citation omitted.] 33 F.2d at 855.

the question concerned whether it was an abuse of discretion to deny the Petitioner's claim for benefits when death resulted from drunken driving. Neither the insurance carrier nor the other policy holders ever agreed or intended to pay benefits for people who decide to endanger themselves and innocent third parties by getting behind the wheel of motor vehicles when they are drunk.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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